



# California Fair Political Practices Commission

July 29, 1988

Ernest H. Tuttle  
Dinuba City Attorney  
759 G Street  
Reedley, CA 93654

Re: Your Request For Advice  
Our File No. I-88-204

Dear Mr. Tuttle:

You have requested advice about application of the Political Reform Act (the "Act")<sup>1/</sup> to governmental duties of councilmembers and other city representatives should they become members of a nonprofit economic development corporation.

The question you have asked does not describe a specific governmental decision. Therefore, we treat it as a request for informal assistance pursuant to Regulation 18329(c)(3)(D) and (F) (copy enclosed).<sup>2/</sup>

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<sup>1/</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

<sup>2/</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

### QUESTIONS

A nonprofit economic development corporation is being set up to encourage industry to locate in Dinuba.

1. Can city councilmembers and other city representatives loan money to or become members of the corporation?

2. Will city councilmembers and other city representatives be required to disqualify themselves from decisions affecting the corporation if they loan money to the corporation?

3. Will city councilmembers and other city representatives be required to disqualify themselves from decisions affecting the corporation if they become members of the corporation?

### CONCLUSIONS

The Act does not restrict public officials from loaning money to or becoming members of a nonprofit corporation.

Under the Act, however, a promise to repay an outstanding loan is considered to be promised income. Therefore, the nonprofit corporation would be a source of promised income to a public official if the official loaned at least \$250 to the corporation. While principal and interest due on the loan equal \$250 or more and for twelve months after they drop below \$250, the official would be disqualified from participating in a governmental decision in which the corporation appeared before the official. An official also would be disqualified from participating in a governmental decision that would have a foreseeable and material financial effect on the corporation, while the outstanding loan was worth \$250 or more and for 12 months thereafter.

Payment of a membership fee that is not a loan, however, would not create an economic interest in a nonprofit corporation. Therefore, membership alone would not be the basis for a disqualifying financial interest in a governmental decision concerning the nonprofit corporation.

### FACTS

The City of Dinuba will be providing money under Government Code Section 37110 to establish a nonprofit corporation to encourage industry to locate in Dinuba. After the city provides start-up costs for the corporation, the city will have no control or other ties with the corporation.

At the moment, the corporation's bylaws provide for a membership fee of \$250. This fee will be a loan that the corporation will pay back to the member with interest. An individual can buy more than one \$250 membership. The corporation will use membership fees to buy land that will be rezoned and sold to new industries.

#### ANALYSIS

City councilmembers and other city representatives are public officials. (Section 82048.) The Act does not prohibit a public official from loaning money to or from becoming a member of a nonprofit corporation.

Nevertheless, public officials may not make, participate in making, or in any way attempt to influence governmental decisions in which they have financial interests. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on the official's economic interest. (Sections 87100 and 87103.) A source of income of \$250 or more provided to, received by or promised to a public official within 12 months before a decision is an economic interest for a public official. (Section 87103(c).)

Section 82030(a) defines income to include a "loan, forgiveness or payment of indebtedness received by the filer...[i]ncome also includes an outstanding loan." Section 87103(c) provides that income of \$250 or more provided to, received by or promised to an official within 12 months before a decision is an economic interest for an official. Therefore, an outstanding loan of \$250 or more made by an official to another person is considered to be promised income to the official from the borrower because the borrower promises to repay the lender. (See Gross Advice Letter, No. A-84-040, copy enclosed.)

Consequently, because the nonprofit corporation plans to repay membership fees with interest, the nonprofit corporation would be a source of promised income to a public official who paid a membership fee of \$250 or more. Such a public official would be disqualified from participating in a governmental decision that would have a foreseeable and material financial effect on the nonprofit corporation if the nonprofit corporation has paid or promised to pay the official \$250 or more in the year before the decision.

Once the balance of the outstanding loan, including interest, drops below \$250, the nonprofit corporation would no longer owe the official \$250 or more. After a twelve-month

period during which the nonprofit has not promised to pay nor paid the official \$250 or more, the official would no longer have an economic interest in the nonprofit corporation. (Gross Advice Letter, supra.) At that point, the loan with the nonprofit corporation no longer would be a basis for the official to disqualify himself or herself.

To determine whether disqualification is required, the official should determine whether the effect of a decision is reasonably foreseeable. An effect does not have to be certain to be foreseeable. If an effect were a mere possibility, however, it would not be foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198, 206-207, copy enclosed.)

To require disqualification, the effect of a decision also must be material. The Commission has concluded that it is reasonably foreseeable that a party who initiates a proceeding will be materially affected by a decision in the proceeding. Therefore, Regulation 18702.1 requires disqualification of a public official if a source of income appears before the official, unless the decision would have no financial effect on the source of income. (Regulation 18702.1(a)(1) and (c)(3).)

For example, assume the corporation applies to the planning commission to change zoning for land the corporation plans to sell to a new industry. A planning commissioner is a member of the corporation. Because that planning commissioner's membership fee really is a loan of \$250, the nonprofit corporation is a source of promised income to the official. If the decision would have any financial effect on the value of the land the corporation owns, the planning commissioner would be disqualified from participating in the zoning decision while the outstanding loan is worth \$250 or more and for twelve months after the principal and interest fall below \$250.

Furthermore, when a governmental decision indirectly affects a nonprofit organization, the public official should use the guidelines in Regulation 18702(b)(3)(D) to determine whether the effect of a decision will be material. Regulation 18702(b)(3)(D) provides that the effect of a decision will be material if it will have a significant effect on a source of income that is a nonprofit entity. Therefore, Dinuba public officials who pay membership fees to the corporation would be disqualified from participating in governmental decisions that would have a significant effect on the nonprofit corporation. (See Pitts Advice Letter, No. A-85-028, copy enclosed.)

Elnesh H. Tuttle  
July 29, 1988  
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At its July 26, 1988 meeting, the Commission adopted Regulation 18702.5 (copy enclosed) which provides specific guidelines for determining the extent of a material financial effect on a nonprofit entity. This regulation will take effect in about 90 days. Please contact us if you need more information about the guidelines. Also, you may want to request additional advice if the present facts change.

On the other hand, if a membership fee were not a loan, a public official would not have an economic interest in the nonprofit corporation. A public official who did not have an outstanding loan with the corporation would be able to participate in a governmental decision concerning the corporation, even if the decision would have a material financial effect on the corporation.

I hope this letter has provided satisfactory answers for your questions. Please call me at (916) 322-5901 if you have any questions about this letter.

Sincerely,

Diane M. Griffiths  
General Counsel

  
By: Margarita Altamirano  
Counsel, Legal Division

DMG:MA:aa

Enclosures

88-204

ERNEST H. TUTTLE

A PROFESSIONAL CORPORATION

ATTORNEY AT LAW

May 25, 1988

MAY 31 1 55 PM '88

Fair Political Practices Commission  
John H. Larson, Chairman  
428 "J" Street, Suite 800  
Sacramento, CA 95814

Dear Sir:

The City of Dinuba is creating a non-profit corporation for economic development to encourage industry to locate there. The corporation will borrow money from individuals and pay interest to those lending the funds. The funds will be used to buy land within the city limits, or at least within its sphere of influence. The land will then be rezoned and sold to prospective new industries.

This Economic Development Corporation is to operate independent of the City, but it is created through funding provided by the City. Two hundred and fifty dollars (\$250.00) buys a membership in the Economic Development Corporation. Voting rights are included in the cost of the membership. A person can buy more than one membership by paying the corresponding multiple of \$250.00. For example, one thousand dollars (\$1,000.00) buys four memberships and four votes.

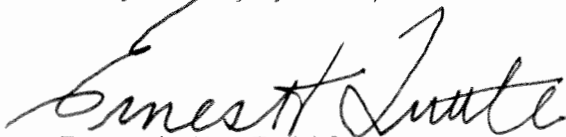
Please advise us as to the following:

- 1) Can a city councilman, or any representative of the City, become members of the Economic Development Corporation without conflicting with the FPPC Act?
- 2) Can a city councilman, or any representative of the City, loan money to the Economic Development Corporation without conflicting with the FPPC Act?
- 3) Please give us any legal authorities that apply.

We would appreciate your consideration of these questions at your earliest convenience. My thinking is that the answer is "NO" to each question, even though the donations are made with the best of intentions.

Thank you for your help in this matter.

Very truly yours,



Ernest H. Tuttle  
Dinuba City Attorney

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ATTORNEY AT LAW

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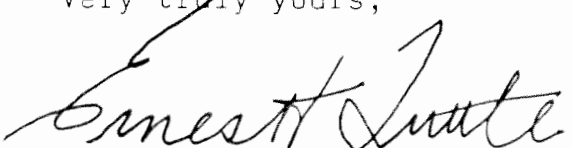
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Thank you for your help in this matter.

Very truly yours,

  
Ernest H. Tuttle  
Dinuba City Attorney



# California Fair Political Practices Commission

June 2, 1988

Ernest H. Tuttle  
Dinuba City Attorney  
759 "G" Street  
Reedley, CA 93654

Re: 88-204

Dear Mr. Tuttle:

Your letter requesting advice under the Political Reform Act was received on May 31, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Margarita Altamirano, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Diane M. Griffiths", is written over the typed name.

Diane M. Griffiths  
General Counsel

DMG:plh





# California Fair Political Practices Commission

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June 2, 1988

Ernest H. Tuttle  
Dinuba City Attorney  
759 "G" Street  
Reedley, CA 93654

Re: 88-204

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You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths  
General Counsel

DMG:plh

August 3, 1988

Please advise status of my request. When can I have your answer?

*Thanks*

Ernest H. Tuttle